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January 17, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Submission, CC Dockets 96-45 and 02-33

Dear Ms. Dortch:

DSLnet Communications, LLC respectfully requests that the attached comments filed today in WC Docket 05-271 be placed in the record and considered by the Commission in its CC Dockets 96-45 and 02-33. For the reasons set forth therein, the Commission should assure going forward that carriers that provide the transmission component of broadband Internet access services on a common carriage basis are not subject to any greater obligations to the Universal Service Fund or other fees than are entities that provide broadband Internet access services under Title I.

Respectfully submitted,

DSL.net Communications, LLC

By: */s/ Marc R. Esterman*
Name: Marc R. Esterman
Title: Vice President

cc: Cathy Carpino

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271
	)	

COMMENTS OF DSLnet COMMUNICATIONS, LLC

DSLnet Communications, LLC ("DSLnet") submits these comments in response to the Commission's *Notice of Proposed Rulemaking* issued in this docket on September 23, 2005, which requested comment on what regulations should be imposed on entities that are providing broadband Internet access services on a non-common carriage basis.

The sole purpose of these comments is to urge the Commission to develop its new regulatory framework in such a way that those carriers that continue to offer the transport component of broadband Internet access service on a common carriage basis are not competitively disadvantaged by more burdensome regulations than those imposed on providers of similar services under Title I. DSLnet does not prejudge whether this objective should be met by imposing Title II-type requirements on "Title I providers," or by relieving Title II broadband providers of certain regulations, or by some combination thereof. But whichever path the Commission chooses, it should assure that carriers are not artificially precluded by relative overregulation from continuing to offer broadband services on a nondiscriminatory basis to the public as common carriers.

The *Wireline Broadband Order* ("*Order*") recognized that some telecommunications carriers will continue to offer the transmission component of broadband Internet access service as a common carrier telecommunications service. For

example, a rural ILEC may choose to do so in order to participate in the NECA pool;[1] Qwest may do so in order to continue to offer stand-alone DSL transport to ISPs on a nondiscriminatory basis;[2] and DSLnet intends to continue to do so to remain eligible to provision such service over UNEs obtained from ILECs under Section 251(c)(3) of the Act.[3]

When the 1996 Act opened the market to more widespread competition almost 10 years ago, DSLnet was one of the first companies to offer broadband DSL transmission services to small and medium-sized businesses for their use in connecting to an Internet service provider. DSLnet remains a vital resource for its customers by providing innovative services and pricing packages as an alternative to the business DSL services subsequently offered by the ILECs. As a practical matter, DSLnet has no choice but to continue to offer these services on a common carriage basis, because it is dependent on access to unbundled loops and transport obtained from ILECs as UNEs pursuant to Section 251(c)(3) of the Act.[4] The *Order* explicitly reaffirmed DSLnet's right to offer broadband Internet access transmission on a common carriage basis and thereby retain eligibility to order UNEs, regardless of the classification of ILEC broadband services.[5]

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[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, et al., Report and Order and Notice of Proposed Rulemaking, FCC 05-150, at ¶ 89, fn. 269. (rel. September 23, 2005) ("*Wireline Broadband Order* or *Order*").

[2] *Wireline Broadband Order* at ¶ 89, fn. 270.

[3] *Wireline Broadband Order* at ¶¶ 126-127.

[4] As the Commission is well aware, UNE eligibility is contingent on the CLEC's provision of at least one eligible telecommunications service. *Wireline Broadband Order* at ¶ 127; *Triennial Review Remand Order* at ¶¶ 34-40.

[5] *Wireline Broadband Order* at ¶¶ 126-127.

The Commission went out of its way to make clear this continued flexibility not just to benefit CLECs, but to promote broadband deployment. The *Order* found that this "primary goal" would be best served "by providing all wireline broadband providers the flexibility to offer these services in the manner that makes the most sense as a business matter and best enables them to respond to the needs of consumers in their respective service areas."[6] Having recognized the importance of giving all broadband providers the "freedom to determine how to provide the broadband transmission capabilities of such services," the Commission should now take care not to squelch that freedom by competitively disadvantaging those carriers that choose to offer broadband transmission to the public on a nondiscriminatory basis.

The *Order* held that "we should regulate like services in a similar manner,"[7] and it emphasized its "objective to create a broadband regulatory regime that is technology and competitively neutral."[8] Similarly, the Commission has elsewhere recently observed that "[a]voiding rule based market distortions with respect to [different categories of competitors] is an important consideration."[9] It would be untenable and ironic if one of the consequences of the *Wireline Broadband Order*, adopted to promote parity in retail regulation of ILEC and cable broadband services, led to the creation of significant new disparities between those broadband Internet access providers that are dependent on UNEs such as DSLnet, versus those that are not.

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[6] *Wireline Broadband Order* at ¶ 89.

[7] *Wireline Broadband Order* at ¶ 45.

[8] *Wireline Broadband Order* at ¶ 4.

[9] *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Second Report and Order, FCC 05-76, ¶ 38 (rel. March 17, 2005).

Perhaps the most significant threat to competitive neutrality lies with the Commission's forthcoming decision regarding whether to impose Universal Service Fund (USF) and other fee obligations on Title I and Title II broadband Internet access providers.[10] DSLnet contributes to USF and other federal programs the required percentage of its interstate revenues from its DSL transmission services, and passes these costs through to its customers in accordance with Commission rules -- as have the ILECs. But competition would be skewed dramatically if the Commission were to exempt ILEC Title I wireline broadband Internet access services from this obligation and saddle CLECs and other Title II broadband providers alone with significant costs no longer borne equally by their competitors. DSLnet therefore supports a platform-neutral solution for USF, such as the proposal to assess universal service obligations based upon telephone number assignments rather than on regulatory classifications.[11] Replacing all USF obligations on broadband transmission with a numbers-based system is fair and would more than adequately sustain the USF program;[12] by contrast, an uneven application of USF obligations would threaten a core objective of the 1996 Act by imposing a

[10] Because the Commission did not explicitly raise this USF issue in the NPRM portion of the Order, DSLnet is concurrently filing these comments as an attachment to an ex parte letter in CC Dockets 96-45 and 02-33.

[11] DSLnet would continue to contribute to USF under this proposal as a result of its affiliated Voice-over-IP information service offering, which uses telephone numbers.

[12] *See* Ad Hoc Telecommunications Users Committee *ex parte*, CC Docket No. 96-45 (Nov. 23, 2005), at 6 ("a USF assessment mechanism that excludes broadband connections used for Internet access, but includes assessments on other broadband connections could in the long run inject instability in the USF funding mechanism and competitive unfairness into the enterprise customer Internet access market.") and at 9 ("Ex parte materials filed by members of the Intercarrier Compensation Forum on July 29 of this year demonstrate that a decision to remove special access services from the new USF assessment mechanism would result in an increase of only $0.03 per month in the required level of a "per number" charge. The additional complexity, instability and possible dead weight that would be embedded in the plan through the inclusion of an assessment upon special access services is simply not justified by a $0.03 per month differential in the overall unit charge.")

regulatory disincentive on consumers from purchasing broadband from UNE-based CLECs.

Similarly, to the extent that the Commission determines that other Title II regulations should not be imposed on Title I broadband Internet access providers, it should on its own motion announce that it will forbear from further application of such regulations on carriers that offer broadband Internet access transmission on a common carrier basis, pursuant to Section 10 of the Act, 47 U.S.C. § 160. If, for example, the Commission determines that it is not necessary to impose something akin to Section 214 discontinuance of service requirements on Title I broadband Internet access services, it would be equally unnecessary to continue to apply such regulation to the same broadband service simply because it happens to be offered under Title II. If the Commission instead applies a relaxed form of discontinuance requirement on Title I broadband, it should use forbearance to assure a similar relaxation for common carrier broadband services.

DSLnet recognizes that it may not be possible or necessary to synchronize in every instance the regulations that would apply to broadband Internet access services under Titles I and II. However, the Commission should make every effort to assure that carriers that choose to exercise their "flexibility" to offer broadband on a common carriage basis are not unduly punished for that choice. Commission regulations are designed ultimately to protect consumers and promote competition; regulations should therefore not operate in a disparate manner that would, as a practical matter, impair the ability of consumers to obtain broadband Internet access services from small competitive carriers such as DSLnet that will remain under the umbrella of Title II.

Respectfully submitted,

DSLnet COMMUNICATIONS, LLC

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